

United States District Court
Eastern District of California

Jose Soria,

Petitioner,

vs.

Edward S. Alameida, et al.,

Respondents.

No. Civ. S 04-2694 FCD PAN P

Findings and Recommendations

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Petitioner, a prisoner without counsel, seeks a writ of habeas corpus. See 28 U.S.C. § 2254. Respondent moves to dismiss upon the ground the petition is untimely. Petitioner opposes.

November 16, 2000, petitioner was convicted.

Petitioner appealed. April 15, 2002, the appellate court found sentencing error and modified the sentence accordingly but otherwise affirmed the judgment.

Petitioner did not file a petition for review in the California Supreme Court.

1 January 31, 2003, petitioner filed a petition for a writ of
2 habeas corpus in the California Supreme Court. September 17,
3 2003, the court denied relief.

4 September 15, 2004, petitioner filed a petition for a writ
5 of habeas corpus in federal court.

6 December 23, 2004, petitioner filed a petition for a writ of
7 habeas corpus in the California Supreme Court. The petition is
8 pending.

9 A one-year limitation period for seeking federal habeas
10 relief begins to run from the latest of the date the judgment
11 became final on direct review, the date on which a state-created
12 impediment to filing is removed, the date the United States
13 Supreme Court makes a new rule retroactively applicable to cases
14 on collateral review or the date on which the factual predicate
15 of a claim could have been discovered through the exercise of due
16 diligence. 28 U.S.C. § 2244(d)(1). The judgment of the
17 appellate court became final May 15, 2002, 30 days after the
18 court filed its opinion. See California Rules of Court, Rules
19 33.1, 24(1). A properly filed state post conviction application
20 tolls the statute of limitations. 28 U.S.C. § 2244(d)(2). In
21 California, a properly filed post conviction application is
22 "pending" during the intervals between a lower court decision and
23 filing a new petition in a higher court. Carey v. Saffold, 536
24 U.S. 214, 223 (2002).

25 Absent tolling, petitioner had until May 15, 2003, to file a
26 petition in federal court.

1 Granting petitioner 229 days' tolling for the time the
2 January 31, 2003, habeas petition was pending in the California
3 Supreme Court, petitioner had until December 30, 2003, to file a
4 petition in federal court. The December 23, 2004, petition in
5 the California Supreme Court provides no basis for statutory
6 tolling because it was filed after the limitation period expired.
7 See Fergusun v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
8 (section 2244(d) does not permit re-initiation of the limitation
9 period when it expires before a timely state petition for post-
10 conviction relief was filed).

11 Petitioner contends he is entitled to equitable tolling.

12 Equitable tolling may be granted only where "extraordinary
13 circumstances beyond a prisoner's control make it impossible to
14 file a petition on time." Calderon v. United States District
15 Court (Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (en banc) cert.
16 *denied*, 526 U.S. 1060 (1999) (quotations and citation omitted).
17 "When external forces, rather than a petitioner's lack of
18 diligence, account for the failure to file a timely claim,
19 equitable tolling of the statute of limitations may be
20 appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.
21 1999). Petitioner must show extraordinary circumstances caused
22 the untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.
23 2003).

24 Petitioner asserts limited access to the law library is an
25 extraordinary circumstance. A prison lockdown preventing law
26 library use during a negligible portion of the limitation period

1 is not necessarily an extraordinary circumstance. Sanchez v.
2 Cambra, 2005 WL 1529834 (C. A. 9 (Cal.)) (denial of access to law
3 library for 10 days not extraordinary circumstance where
4 petitioner did not use library when given the opportunity).
5 Petitioner alleges the Northern Hispanic population at Salinas
6 Valley State Prison, of which he is a member, has been on
7 lockdown since he arrived February 1, 2002, until the present.
8 He asserts he was denied library time for four months but he
9 otherwise had access to the law library according to a rotation
10 schedule or upon proof of a court-imposed filing date.

11 Petitioner does not identify the four-month period when he
12 was denied library time but it does not matter because he does
13 not assert lack of access during the remaining eight months. In
14 any event, he filed a habeas petition in the California Supreme
15 Court before the limitation period expired and so even if the
16 lockdown is extraordinary, petitioner fails to satisfy his burden
17 under Spitsyn because he has not explained why he could file in
18 state court but not in federal court, which requires all claims
19 first be presented to the state court.

20 Petitioner also alleges he had no access to the law library
21 while he was in administrative segregation¹ from February 2,
22 2004, until July 1, 2004. But this is inapposite because the
23 limitation period already had expired.

24
25 ¹ I note petitioner's placement was a disciplinary measure for
26 petitioner's possession of a weapon and so it was not a circumstance outside
his control.

1 For these reasons, I find the September 15, 2004, petition
2 is untimely.

3 I therefore recommend this action be dismissed.

4 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
5 findings and recommendations are submitted to the United States
6 District Judge assigned to this case. Within 20 days after being
7 served with these findings and recommendations, petitioner may
8 file written objections. The document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations."
10 The district judge may accept, reject, or modify these findings
11 and recommendations in whole or in part.

12 Dated: August 30, 2005.

13 /s/ Peter A. Nowinski
14 PETER A. NOWINSKI
15 Magistrate Judge
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